

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-6575

JOHN H. PLATH, Petitioner,
versus,
STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A
TRUE COPY OF Brief of Respondent
HAS BEEN SERVED UPON OPPOSING COUNSEL BY
MAILING 1 COPIES IN AN ENVELOPE PROPERLY
ADDRESSED WITH POSTAGE PREPAID THIS 18th
DAY OF April, 1984
Hon. H. M. Coombs, Jr.
ATTORNEY FOR Respondent
SWORN TO BEFORE ME THIS 18th DAY
OF April, 1984
Karen Y. Newton (L.S.)
Notary Public for South Carolina
My Commission Expires 9-17-86

Supreme Court, U.S.

FILED

APR 20 1984

ALEXANDER L. STEVAS
CLERK

QUESTION PRESENTED

I.

Should the Court grant the writ to determine if the Petitioner was denied the Sixth Amendment right to counsel at a jury view of the crime scene during his capital sentencing proceeding in light of this Court's holding that a jury view of the crime scene does not constitute part of a trial for purposes of a defendant's due process right to be present and in light of the fact that trial counsel neither objected to the jury view arrangements nor requested that either they or Petitioner accompany the jury and trial judge to the crime scene?

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Should this go to habeas for full
evidentiary hearing on ① whether
issues raised ② harmless error?
No claim of harmless error

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 22027, filed January 17, 1984, as reproduced in Petitioner's Appendix at pages A-1 - A-12.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Should the Court grant the writ to determine if the Petitioner was denied the Sixth Amendment right to counsel at a jury view of the crime scene during his capital sentencing proceeding in light of this Court's holding that a jury view of the crime scene does not constitute part of a trial for purposes of a defendant's due process right to be present and in light of the fact that trial counsel neither

objected to the jury view arrangements nor requested that either they or Petitioner accompany the jury and trial judge to the crime scene?

ARGUMENT

I.

The trial judge's conducting a jury view of the crime scene after discussing all arrangements with counsel in the presence of the Petitioner and after no objection to the arrangements was made at trial does not raise any constitutional issue for review by this Court.

Petitioner alleges error in the trial judge's conduct of a jury visit to the scene of the crime. The Transcript of Record before the South Carolina Supreme Court (Tr.) demonstrates that trial counsel initially proposed that counsel accompany the jury only for the purpose of insuring that no comments concerning the scene were made to the jury. When the trial judge assured counsel that he (trial judge) would personally "see that the jury is just allowed to see the scene with no discussions," counsel explicitly consented to the arrangements. (Tr. p. 2143, line 16-p. 2145, line 7). Accordingly, the South Carolina Supreme Court has made the factual determination:

wrong
At no time did counsel for the appellants request permission to accompany the jury or to have the appellants do so. All arrangements for the jury view were thoroughly discussed with counsel in the presence of the defendants, and no hint of opposition on their part was expressed. State v. Plath, et

al., Op. No. 22027, South Carolina
Supreme Court, 1/17/84 (Petitioner's Appendix p. A-5).

Further, the court observed:

[C]ounsel for appellant Plath [had] requested that the next day's proceeding commence later than usual to enable him to consult with witnesses. This particular request was denied, yet the effect of the jury view without counsel for defendants created the delay they had actually sought. State v. Plath, et al., supra. (Petitioner's Appendix p. A-5).

"[A] jury view of the crime scene does not constitute part of a trial for purposes of a defendant's due process right to be present." State v. Plath, et al., supra, citing, Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). While the use of counsel as showers at a jury view has its roots in ancient practice, there is no necessity for the presence of counsel where the entire jury view is under the direction of the trial judge in the absence of counsel. See Snyder v. Massachusetts, supra. At common law a jury view is neither a trial nor any part of a trial, Snyder, 291 U.S. at 113, and no advantage nor prejudice may result from the absence of counsel at a bare viewing where no attention is directed toward any particular feature of a scene. See Snyder, 291 U.S. at 108.

[A] jury view of the scene is not a taking of testimony. Constitutional protections are not implicated or denied when, as here, the trial judge in fact accompanies the jury in the absence of defendants and their counsel, there

having been neither an objection to the arrangement nor even a request to be taken along. State v. Plath, et al., supra. (Petitioner's Appendix A-6).

Petitioner seeks to have this Court review a complaint which was not made before the trial judge but which was fully considered for the first time on appeal by the South Carolina Supreme Court. The South Carolina Supreme Court's findings of the absence of an issue of constitutional dimension, no hint of opposition to the absence of counsel at the jury view when the arrangements were thoroughly discussed with counsel in the presence of Petitioner, and the absence of any demonstrable prejudice to Petitioner, in light of the facts and circumstances of the case, are separate and sufficient reasons why the writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

April 18, 1984.

